

IS THERE A TYRANNY OF THE CHARTER IN CRIMINAL JUSTICE AND SECURITY POLICY?

Kent Roach

The Charter has had an important effect on criminal justice and security policy-making that was not anticipated in 1982. Nevertheless, there is not necessarily a tyranny of the Charter, in which security policy is dictated by the Charter. The Charter is most often applied against the actions of unelected police and prosecutors as opposed to elected legislatures. Even when laws are struck down under the Charter, the result has often been vigorous dialogue between courts and legislatures. There is no incompatibility between strong courts enforcing the Charter and strong governments implementing proactive criminal justice and security policies. The Charter should only smooth the sharp edges of broader criminal justice and security policy. Canada is doing a better job in developing a coherent and proactive security policy than a coherent criminal justice policy, but in both cases governments should resist the temptation of limiting their vision to attempting to predict or react to the Charter decisions of the courts.

La Charte des droits et libertés a exercé sur la justice pénale et la politique de sécurité une influence qu'on n'avait pas prévue en 1982. Mais il ne s'ensuit pas que cette influence dicte nécessairement, de manière tyrannique, notre politique de sécurité. La Charte s'applique le plus souvent aux actions de la police et de procureurs non élus, plutôt qu'aux assemblées législatives. Et même quand des lois sont abrogées en son nom, il en est souvent résulté un dialogue constructif entre les tribunaux et les législatures. Il n'y a rien d'incompatible entre des tribunaux forts qui appliquent la Charte et des gouvernements tout aussi forts qui votent de solides politiques de sécurité et de justice. La Charte ne devrait que permettre d'assouplir celles-ci, au besoin. Notre politique de sécurité est certes plus dynamique et plus cohérente que notre politique de justice pénale, mais les gouvernements devraient éviter dans les deux cas de restreindre leur vision en cherchant à prédire les décisions des tribunaux fondées sur la Charte.



Few people would have predicted in 1982 that about two-thirds of all Charter decisions by the Supreme Court would involve the rights of those accused of crimes. The legal rights and remedies of the accused — rights against unreasonable searches and detention, right to counsel and fair trial rights, exclusion of unconstitutionally obtained evidence — were something of an afterthought in the drafting of the Charter.

The federal government was prepared to water down legal rights and continue the traditional rule that improperly obtained but reliable evidence was admissible in an attempt to get the provinces on side with the patriation package. It was only when the provinces refused to agree

that civil liberties and lawyers' groups were able to beef up legal rights and remedies during the joint committee process. The victims' movement was in 1982 in its infancy and its voice was not heard in the drafting of the Charter.

Once the Charter was amended to require substantive rights and remedies for the accused, the result was surprising given the prior record of the courts under the Canadian Bill of Rights. The Dickson and Lamer courts interpreted the accused's rights and remedies very generously and, indeed, in some important areas involving search and seizure, law and the substantive criminal law went beyond even the liberal 1960s American Warren Court. Writing on the 10th anniversary of the Charter, two prominent defence lawyers

declared that the Charter was “the stuff that dreams were made of!”

Dreams for some, but perhaps nightmares for others. The Court has at various times excluded evidence crucial to establish the guilt of those accused of murder, sexual assault and other serious crimes. It has limited police powers and has with some exceptions

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required judicially authorized warrants for many searches and seizures. Any constitutional violations committed by the police while conscripting evidence from the accused will generally result in the exclusion of the evidence from subsequent criminal trials.

But it would be wrong to leave the impression of an extravagant due process revolution or one that has produced a tyranny of the Charter in which the courts restrain and dictate criminal justice policy. It is too easy for the public and governments to blame failures of security policy on the Charter. My point relates both to the internal nuances of the Court’s doctrine, which often leave the state much room to act, and to a more global judgment that the Charter is irrelevant to most security policy-making.

Doctrinally, there is more nuance than much public discourse admits. The Court has not adopted an automatic exclusionary rule and with respect to evidence like drugs and guns it often proceeds cautiously, balancing the seriousness of the Charter violation against the adverse effects of excluding critical evidence. The McLachlin Court has demonstrated a willingness to tone

down the exclusionary rule, as well as a reluctance to strike down child pornography and marijuana offences. After having struck down one mandatory minimum sentence in 1987, the Court has upheld all subsequent mandatory sentences that have been challenged.

In addition, the oft-maligned dialogue between courts and legislatures

is very alive in the criminal justice area. At several junctures, the Court has intervened on behalf of the rights of those accused of sexual assault. Parliament, however, has been very quick in responding with aggressive reply legislation that has asserted the privacy and equality rights of complainants, as well as the social interest in encouraging the reporting of sexual assaults. The Court has upheld even the most aggressive of these replies.

Some of the Court’s most adventurous forays into criminal justice policy — the narrowing of murder laws, speedy trial rights and disclosure obligations — can all be seen as a response to prolonged parliamentary inertia on these topics.

Although it is popular in some quarters to deprecate the Charter and judicial review on the basis that Parliament’s views should prevail when there is reasonable disagreement about rights with the unelected Court, this view does not make much sense in the critical criminal justice context. First, most of the Court’s decisions pit the unelected Court against the equally unelected police and prosecutors. The Court’s activism with respect to

criminal justice builds on solid rule of law foundations.

Second, even when the Court does take on Parliament with respect to matters of criminal law, it is difficult to believe that Parliament would take the accused’s rights seriously in the absence of vigorous judicial review. It is very easy and very popular to enact tough new laws against child pornography; it is much more difficult to factor freedom of expression into the equation.

It is important for the Court to take unpopular stands to defend the rights of the accused who are, with the possible exception of non-citizens, the most unpopular segment of society. At the same time, however, we should recognize that Parliament and the provinces remain in the driver’s seat when it comes to most security policy.

The mid-1990s were perhaps the high-water mark for due process protections under the Charter; it was also a time in which Canada’s prisons were the most full. The 1996 introduction of conditional sentences started a process that saw a relative decline in Canada’s imprisonment rate, but it is one that could change with the present government’s enthusiasm for restricting conditional sentences and using more mandatory penalties. Similarly, the *Youth Criminal Justice Act* has also addressed Canada’s extreme, as measured by international standards, reliance on imprisoning young people. But these developments were not dictated by the Charter and the Charter would not prevent governments from changing them tomorrow.

Far from a tyranny in which criminal justice policy is dictated by the constraints of the Charter, we live in a world without enough smart criminal justice policy. Successive governments lurch from criminal justice crisis to criminal justice crisis and when they look for solutions, it is often quick and



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Justice Dennis O'Connor at the release of his second report on the Maher Arar matter, in which he found significant abuse of power by the RCMP and recommended the creation of two bodies with oversight over security issues. The lower courts have also ruled that Bill C-36, the anti-terrorism law enacted after 9/11, is in conflict with Charter rights.

simplistic ones such as mandatory sentences and reverse onuses. Too much legislation is reactive either to specific court decisions or horrific crimes or to the international community's attention to the crime du jour.

Although divided federal-provincial jurisdiction over criminal law and its administration presents many challenges, we need more proactive and thoughtful policy and planning about what we hope to achieve with criminal justice. Is it simply punishment and

incapacitation? Or can criminal justice improve the lives of offenders, victims and communities? What is our drug strategy? How should we deal with many who are in jail because of mental health problems or fetal alcohol syndrome? What are we doing about what the Supreme Court recognized in 1999 was the crisis of the growing number of young Aboriginal people in our jails? What is our strategy to complete mega-trials? Does the Criminal Code need to be overhauled to reflect

new information technologies and the Internet? How will we deal with fear of crime in an aging society? These are fundamental questions that we have barely begun to ask ourselves, let alone answer. The answers will not, however, be found in the Charter.

The present government has unfortunately taken away one of its instruments for forward and independent thinking about criminal justice policy by cutting off funding for

the Law Commission of Canada, established by Parliament in 1996. The Law Commission had the potential to provide a forward-looking view of what the criminal justice system should look like. It examined issues such as the place of restorative justice or private policing in the justice system. Now policy work will all be done within the confines of the Department of Justice where the emphasis is often on responding to the next crisis or Charter-proofing the next law.

Canada's national security policy is more promising than its criminal justice policy because at least there is a policy. Originally captivated by the legalistic exercises of crafting an anti-terrorism law that would go as far as the Charter would allow, policy-makers have since 2004 started to break away from the tyranny of the Charter and to think in longer-term and more holistic ways that do not rely solely on the passage of criminal laws that are consistent with the Charter.

Bill C-36 containing what was to be the *Anti-Terrorism Act* was introduced in Parliament on October 15, 2001, after what was said to be the most extensive Charter vetting process ever. The government expected Canadians to

accept amendments after it was introduced. They persuaded the government to amend the definition of terrorist activities so that unlawful protests and strikes that disrupted essential services were not branded as terrorism. This not only provided protection for dissent, but tried to focus on the act of the murder and maiming of civilians that is the essence of the terrorist threat.

In response to criticisms, the government subjected the new police powers of preventive arrest and investigative hearings to a renewable five-year sunset. It also qualified the inclusion of political and religious motive in an attempt to signify that the concern of the Act was not with the expression of extreme religious or political views. The changes to Bill C-36 not only respected Charter values, but served a more instrumental purpose. In an era characterized by concerns about home grown terrorism, it is important to counter al-Qaeda's distorted image of the "war against terrorism" as a war against Islam. Democracies should display their true colours and commitments to human rights to counter the ideology of terrorism.

In any event, the Charter-proofing of Bill C-36 has not turned out exactly

those compelled to incriminate themselves. Moreover, it subjected the whole investigative process to the presumption of an open court in ways not likely anticipated by the drafters. Investigative hearings may have turned out to be Charter-proof, but they are a blunt means to deal with the need to protect witnesses and informers. Just because something is consistent with the Charter does not mean that it constitutes wise or effective security policy.

Other parts of Bill C-36 have taken more of a Charter beating. In a pre-trial ruling in the first prosecution conducted under the new Act, a judge has ruled that the political or religious motive requirement in the definition of terrorist activities was an unjustified violation of the freedom of speech, association and religion and an invitation to religious and racial profiling. This ruling may create some problems, but they are related more to other examples of overbreadth in Parliament's definition of terrorism. The Supreme Court has already read a narrow definition of terrorism that focuses on the murder and maiming of innocent civilians into immigration law and this definition would be more than adequate to apply to al-Qaeda and those inspired by al-Qaeda.

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accept it as an effective and rights-friendly response to the horrors of 9/11.

Many groups, however, resisted the new law and obtained some signif-

icant amendments after it was introduced. To be sure, the Supreme Court refused to strike down investigative hearings, but at the same time it extended immunity protections for

Another judge has in the Juliet O'Neill case struck down the provisions of Canada's renamed *Official Secrets Act* that apply, albeit extremely unclearly, to the possession of leaked secrets. The story here is not so much of the hubris of Charter-proofing but the more familiar one of Parliament leaving on the books an old and badly drafted law until the courts finally do some housecleaning. The Court's due process decision in favour of

O'Neill of course comes with a price: it makes it more difficult to discover who in government leaked information designed to discredit Maher Arar.

After the government fought to enact the *Anti-Terrorism Act* by the end of 2001, however, it seemed exhausted and it was not until 2004 that it enacted a new public safety act to address more mundane but more important issues concerning administrative measures to protect sites and substances vulnerable to terrorism and to allow information to be shared within and between governments.

The O'Connor Commission in the Arar case has recently reminded us of the dangers of sharing inaccurate information and the need for more effective review of the RCMP and other national security agencies. There are important questions about the balance between review and oversight; between review for propriety and for efficacy; and between review by a variety of executive watchdogs and by legislative committees. The resolution of these debates will be important to our evolving security policy, but again they are not dictated by the Charter.

Canadian national security policy is evolving into a new phase where more attention is devoted to review and perhaps oversight and less to creating new laws and ensuring that they respect the Charter. Effective and coordinated review by executive watchdogs such as the Security Intelligence Review Committee, the Privacy Commission and a new body to review the RCMP is needed to uphold the spirit of the Charter because so few security cases will actually go to court.

In 2004, the government proclaimed its first official national security policy. In part because of the 2003 SARS outbreak, the Canadian policy is an all-risk one designed to respond not only to terrorism but to pandemics and natural disasters. It features the all-risk theme of emergency preparedness. The failure of Homeland Security to miti-

gate the ravages of Hurricane Katrina confirms the wisdom of the Canadian approach. The Canadian approach is the result of security policy-making, not fencing with the courts over how the Charter should be interpreted.

The Charter will continue to play a significant role as Canada's criminal justice and security policies continue to evolve. This is how it should be. Putting someone in jail is perhaps the most significant act that a democracy can undertake and the Charter enforced by the

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independent judiciary helps ensure that we recognize the momentous nature of such an act. Treating criminals and terrorists fairly also helps legitimate the punishment that they receive.

Without the Charter vigorously enforced by the courts, it would be too easy for Parliament, in its desire to send signals to the electorate that it is tough on crime and messages to our allies that it is tough on terrorism, to enact over-the-top laws that violate human rights. Without the Charter, Canada's anti-terrorism laws might look more like Australia's where the Howard government has engaged in an orgy of popular law-making that has made membership or association with groups that praise terrorism a crime and has allowed their version of the Canadian Security Intelligence Service to detain people for up to a week on the basis that they have "intelligence that is important in relation to a terrorism offence."

We need strong courts to enforce the Charter, but we also need strong

governments to proclaim and implement effective criminal justice and security policies. Many seem to think that strong courts somehow weaken strong governments. But this approach discounts dialogue between courts and legislatures under the Charter, but more importantly fails to see the vast policy space that governments occupy (or fail to occupy) on security issues that is not affected by the Charter.

The temptation to give in to the tyranny of the Charter in which gov-

ernments dominated by a cadre of Charter lawyers focus on predicting and reacting to Charter decisions should be resisted. Governments have largely succumbed to the tyranny of the Charter with respect to criminal justice. There is a distinct dearth of sound, empirically tested and proactive criminal justice policy in Canada.

The prospects with respect to security policy are more promising. Canada at least has a national security policy. In the years to come, the Charter will continue to constrain and soften the sharp edges of Canada's security policy, but hopefully governments will continue to see the big picture and not give in to the tyranny of the Charter.

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